

FEDERAL MAGISTRATES COURT OF AUSTRALIA

LI v MINISTER FOR IMMIGRATION & ANOR [2007] FMCA 454

MIGRATION – Migration Review Tribunal – spouse visa – whether the Tribunal failed to take into account relevant considerations – whether the Tribunal took into account irrelevant considerations – whether the Tribunal had a duty to enquire in the circumstances of this case – whether reg.1.15A(1A)(b) is invalid.

Marriage Act 1961, s.88E

Migration Act 1958, ss.12, 31(3), 56, 58, 359A, 363

Migration Regulations 1994, reg.1.15A, Sch 2 cl.100.221

Abebe v The Commonwealth (1999) 197 CLR 510

Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686

Halkic v Minister for Immigration & Anor [2006] FMCA 1646

Le & Ors v Minister for Immigration & Anor [2007] FMCA 427

Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 225

Luu v Renevier (1989) 91 ALR 39

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration, Multicultural & Indigenous Affairs v Yusuf (2001) 206 CLR 323

Paramanathan v Minister for Immigration and Multicultural Affairs (1998) 94 FCR 28

Pidoto & Ors v The State of Victoria (1943) 68 CLR 87

Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155

Applicant: XIAO YING LI

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File number: MLG 1237 of 2006

Judgment of: Riley FM
Hearing date: 20 March 2007

Date of last submission: 20 March 2007

Delivered at: Melbourne

Delivered on: 8 May 2007

REPRESENTATION

Counsel for the Applicant: Anthony Krohn

Solicitors for the Applicant: Chua Tan & Associates

Counsel for the First
Respondent: Chris Horan

Solicitors for the First
Respondent: Australian Government Solicitor

ORDERS

- (1) The application filed on 2 October 2006 be dismissed.
- (2) The applicant pay the first respondent's costs, fixed in the sum of \$5,000.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG 1237 of 2006

XIAO YING LI
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application filed on 2 October 2006 seeking judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) signed on 21 August 2006. That decision affirmed a decision of the first respondent’s delegate refusing to grant a partner visa to the applicant.
2. The applicant is a 40 year old female citizen of the Peoples Republic of China. On 1 March 2001, she married Mr Dinh Chuc Do (“the sponsor”) in China. On 6 March 2001, she lodged a combined visa application for a subclass 309 (temporary) and subclass 100 (permanent) partner visa. On 8 February 2002, she was granted a temporary partner visa and she arrived in Australia on 23 March 2002.

On 29 October 2004, a delegate of the first respondent refused the permanent partner visa application.

3. On 18 November 2004, the applicant applied to the Tribunal for review of the decision of the delegate. On 4 September 2006, the Tribunal handed down its decision affirming the decision of the delegate refusing to grant a permanent partner visa to the applicant. On 2 October 2006, an application for judicial review of the Tribunal's decision and supporting affidavit was filed in this court. On 30 November 2006, the applicant filed an amended application and contentions of fact and law. On 8 January 2007, the first respondent filed contentions of fact and law.

The legislation

4. The relevant time of decision criteria for the grant of a permanent partner visa are set out in clause 100.221 of Schedule 2 of the *Migration Regulations 1994* ("the regulations") which states that:

100.221 Criteria to be satisfied at time of decision

(1) The applicant meets the requirements of subclause (2), (2A), (3), (4) or (4A).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant:

(i) is the holder of a Subclass 309 (Spouse (Provisional)) visa; or

...

(b) the applicant is the spouse of the sponsoring spouse; and

(c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.

5. "Spouse" is relevantly defined in regulation 1.15A as follows:

1.15A Spouse

(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

- (a) *in a married relationship, as described in subregulation (1A); or*
- (b) *in a de facto relationship, as described in subregulation (2).*

(1A) Persons are in a married relationship if:

- (a) *they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and*
- (b) *the Minister is satisfied that:*
 - (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (ii) *the relationship between them is genuine and continuing; and*
 - (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

...

- (3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:*

...

- (ae) *a Partner (Provisional) (Class UF) visa; or*

...

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

- (a) *the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*

- (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
- (iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*
- (v) *the basis of any sharing of day-to-day household expenses;*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

...

- (5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.*

Tribunal's reasons for decision

6. In its reasons for decision, the Tribunal detailed the material before it. That material included the departmental file, and, in particular, the notes of the delegate's interview with the applicant and the sponsor, documentary evidence submitted to the delegate and to the Tribunal, oral evidence provided at the Tribunal hearing and submissions made in response to two notices issued pursuant to s.359A of the *Migration Act 1958* ("the Act").
7. In the section of the decision titled 'Findings', the Tribunal set out clause 100.221 of schedule 2 of the regulations and summarised the effect of regulation 1.15A as follows:

[77] Regulation 1.15A contains the test for determining whether one person is the 'spouse' of another person, whether in a married or a de facto relationship. It requires that, in addition to being married, the sponsor and the visa applicant must have a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship between them must be genuine and continuing and they must live together or not live separately and apart on a permanent basis. In forming a view whether two persons are in a married relationship, the Tribunal is required to have regard to all of the circumstances of the relationship, including, in particular, the matters set out in subregulation 1.15A(3). These considerations relate to all of the circumstances of the relationship including, in particular, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and nature of the persons' commitment to each other. In Nassouh v Minister for Immigration and Multicultural Affairs [2000] FCA 788 (14 June 2000), the Federal Court pointed out that subregulation 1.15A(3) is expressed in mandatory terms and sets out the particular circumstances of the relationship to which regard must be had by the Minister.

8. The Tribunal then proceeded to consider the financial aspects of the applicant's and sponsor's relationship, the nature of their household, the social aspects of their relationship, and the nature of their commitment to each other.
9. In relation to the financial aspects of the relationship, the Tribunal found that the '*parties have submitted some evidence to support their claim that they have combined their financial affairs.*' However, the Tribunal observed that '*there are a number of aspects to the evidence that has been submitted that detract from the claim that the visa applicant and the sponsor have combined their financial affairs.*' It also noted inconsistencies in the oral evidence given by the applicant and the sponsor at the Tribunal hearing regarding their financial relationship. With respect to this issue, the Tribunal concluded:

[91] The Tribunal considers that the evidence before it raises some doubts about whether the parties did share to any extent the financial responsibility associated with the payment of their rent. Whilst there is evidence of rent receipts, given the appearance of and errors contained within these rent receipts, the Tribunal is not in a position, on the evidence before it, to be satisfied that these receipts are indicative of the extent to which the visa applicant and sponsor combined their financial affairs. In the circumstances, the Tribunal cannot exclude the possibility that these receipts were merely prepared to bolster the visa applicant's claims to be in a genuine spousal relationship with the sponsor at the time of decision. As a result, the Tribunal does not find this evidence particularly persuasive of the parties' claims to have combined their financial affairs and gives it less weight in its assessment of the relevant issues.

[92] Therefore, taking into account the totality of the evidence before it, on balance, the Tribunal finds that the financial aspects of the parties' relationship at the time of decision have not been established.

10. Secondly, the Tribunal considered the nature of the household. With respect to this issue, the Tribunal found:

[103] ... However, on balance, given the number of discrepancies in the parties' evidence in relation to their living arrangements, the Tribunal is not satisfied that this evidence establishes that the parties have shared and continue to share a genuine household at the time of decision.

11. Thirdly, in relation to the social aspects of the relationship, the Tribunal concluded:

[108] Accordingly, on balance, the Tribunal is prepared to accept that elements of the evidence indicate that the visa applicant and the sponsor have represented themselves to family and friend [sic] as a couple at the time of decision.

12. Fourthly, under the heading “whether the parties live together, or do not live separately and apart on a permanent basis”, the Tribunal said:

[112] Consequently, on balance, given the inconsistencies in evidence that have been discussed previously, the Tribunal finds that the evidence that the parties are living together at the time of decision is not particularly strong.

13. Fifthly, the Tribunal considered whether the relationship between the applicant and sponsor was genuine and continuing with reference to subregulation 1.15A(5). While the Tribunal noted that documentary evidence appeared to indicate that the parties had been living together at the same address for more than six months, it said:

[115] ... the Tribunal finds that the evidence in this case effectively rebuts the presumption in subregulation 1.15A(5). Accordingly, the Tribunal finds that the relationship between the visa applicant and the sponsor is not genuine and continuing at the time of decision.

14. Sixthly, the Tribunal considered the applicant’s and sponsor’s commitment to each other and whether their relationship was genuine and continuing, saying that:

[122] As a consequence, notwithstanding the claims that have been made in this regard, given the conflicting nature of much of the evidence before it, the Tribunal has some serious reservations in accepting that the parties regard their relationship as a long term relationship at the time of decision. The Tribunal accepts that in certain cases some inconsistency in the evidence may not detract from a finding that a marriage is genuine and continuing; particularly having regard [sic] cultural factors, the age and health of the respective parties. However, the Tribunal also notes that in this case there are a number of inconsistencies in the evidence of the parties. Although some of the explanations provided by the visa applicant are plausible, they do not fully or adequately explain away all the contradictions in the evidence.

The Tribunal has also had regard to the fact that in some instances, although not all, some of the finer details of the parties' relationship have only been provided after discrepancies in the evidence have been identified. As a result, when all these factors are taken together with some of the limitations that exist in relation to the probative value of the objective evidence before the Tribunal, on balance, having regard to the totality of the evidence before it, the Tribunal is not satisfied that the visa applicant and the sponsor have demonstrated a genuine commitment to each other as spouses at the time of decision.

15. Lastly, the Tribunal considered whether there was a mutual commitment between the applicant and sponsor to a shared life as husband and wife to the exclusion of all others. On this issue, the Tribunal set out a quotation from *Minister for Immigration, Local Government and Ethnic Affairs v Dhillon* (unreported, 8 May 1990) as follows:

... people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

16. The Tribunal then said:

[124] In this case, the Tribunal observes that the evidence raises a number of issues in relation to whether the visa applicant and the sponsor had a mutual commitment to a shared life as spouses to the exclusion of others at the time of decision. The Tribunal accepts that the fact there may be inconsistencies in the evidence does not inevitably lead to a conclusion that the parties concerned do not have a genuine and continuing relationship and a mutual commitment to a shared life as spouses to the exclusion of all others. However, as stated previously, in this case there are some significant gaps in the evidence before the Tribunal. These relate to the financial aspects of the parties' relationship, the nature of the couple's household and living arrangements as well as their long-term commitment to their relationship. In this case,

the Tribunal considers that the evidence taken as a whole raises doubts as to whether the visa applicant and the review applicant have a mutual commitment to a shared life as spouses to the exclusion of others at the time of decision. After considering the evidence and applying the test outlined in Dhillon, the Tribunal considers that the factors set out in subregulation 1.15A(3) are not indicative of a spousal relationship at the time of decision. In light of the evidence, the Tribunal is not satisfied that the relationship between the visa applicant and the sponsor is genuine and continuing at the time of decision.

Ground 1: relevant considerations

17. In the amended application filed with the court on 30 November 2006, the first ground of review is as follows:

1. *The decision was affected by jurisdictional error in that the Tribunal failed to have regard to a relevant consideration or considerations.*

(a) persistence

18. The particulars of the first aspect of the first ground of review are as follows:

- (a) *Notes of the Minister's officers of their interviews on 3 September 2004 with the applicant and the applicant's husband (Department file, folios 174.5-174.9, 183.2) showed that they spoke to both the applicant and her husband about problems with the application for the visa, its certain refusal by the delegate, and the possibility of the applicant withdrawing her application or the sponsor withdrawing his sponsorship and "the consequences" (unspecified in the notes) of this. The Tribunal, however, in assessing whether the applicant and her husband were spouses within the meaning of Regulation 1.15A of the Migration Regulations 1994 failed to have regard to the fact that despite this conversation about withdrawing the application and its impending failure if not withdrawn, both the applicant and her husband continued with the application and refused to withdraw it.*

19. The applicant's written contentions on this aspect of the first ground were as follows:

(a) Persistence with application against urging of the Minister's officers

[19] The commitment of the applicant and her husband to the relationship is a matter made relevant by Regulation 1.15A(1A) (b)(i) and (ii) which respectively require that “they have a mutual commitment to a shared life as husband and wife to the exclusion of all others” and “the relationship between them is genuine and continuing”. The notes of the interview conducted by the officer of the Minister's Department revealed that the Minister's officers spoke to the applicant and her husband about problems with the application for the visa, its certain refusal by the delegate and the possibility of the applicant withdrawing her application or the sponsor withdrawing his sponsorship and ‘the consequences’ (not specified in the officers' notes) of this. (CB 69.9-70.1, 73.5) Despite this conversation, the thrust of which appears to have been urging, at least to some extent, the withdrawal of the application, the applicant and her husband determined to persist with the application, despite advice that the delegate would refuse to grant the visa. (CB 73.5) This was conduct which of itself was powerful evidence in favour of the parties' commitment to a shared life as husband and wife and that “the relationship between them is genuine and continuing”.. The Tribunal however failed in its reason for decision to have regard to this determination of the parties to persevere with the application in the face of assured rejection by the Minister's Department. It thus failed to have regard to a relevant consideration.

20. The first respondent's written submissions on this ground were as follows:

[12] As is conceded by the applicant [footnote: applicant's contentions, para 11], the notes of the Departmental interview were part of the evidence that was before the Tribunal [CB168.4, 170-171]. The Tribunal referred to the interview in its reasons. It must be inferred that the Tribunal had regard to the notes of the interview. In substance, the applicant's complaint is that the Tribunal did not expressly refer to or place weight on certain aspects of the notes of interview. This is essentially a complaint about the use of evidence by the Tribunal, and the merits of the Tribunal's reasoning process, and does not reveal any failure by the Tribunal to have regard to a consideration which it was bound to take into account.

[13] As in Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 225 at 236 (Carr

J with whom Sheppard and Gummow JJ agreed) [footnote: see also Walsh v Department of Employment, Education, Training and Youth Affairs (1998) 51 ALD 690 at 693; Chu Sing Wun v Minister for Immigration and Ethnic Affairs [1997] FCA 1017], the applicant's submission "confuses taking into account relevant considerations with taking into account particular pieces of evidence". In that case, the Court rejected an argument that the delegate had erred in failing to take into account DFAT cables containing information which was said to support the appellants claims. The relevant consideration which the delegate was required to take into account was what might happen to the appellants if they were returned to China, and not the contents of the particular cables. The Court referred to Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363 at 375, where Deane J observed:

"It is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the importance to be accorded to matters which he so regards."

[14] Similarly, the notes of interview in the present case were "pieces of evidence", and did not themselves constitute a relevant consideration to which the Tribunal was bound to have regard.

[15] A relevant consideration is a consideration which the decision-maker is bound to take into account [footnote: Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-41]. Where relevant considerations are not expressly stated in the statute, they must be ascertained from the subject-matter, scope and purpose of the legislation. Accordingly, the identification of relevant and irrelevant considerations is to be drawn from the terms of the empowering statute, rather than from the particular facts of the case that the decision-maker is called on to consider. [footnote: Abebe v The Commonwealth (1999) 197 CLR 510 at 579 [195] (Gummow and Hayne JJ)].

[16] The applicant contends that the Tribunal failed to have regard to the "persistence" of the applicant and the sponsor in continuing with the application, after having been given the opportunity to withdraw the application or sponsorship. This is an evaluation or conclusion which is sought to be drawn from the evidence of the Departmental interview. Even if it can be assumed that such an evaluation or conclusion is open [footnote: The decision not to withdraw the application or sponsorship does not lead to a necessary inference that the relationship was genuine and continuing. There were many possible reasons for

the decision to continue with the application. In the circumstances, the “persistence” with the application at the Departmental interview was of little if any weight in determining whether the applicant was the spouse of the sponsor at the time of the Tribunal’s decision.],it cannot be regarded as a relevant consideration in the Peko-Wallsend sense. It was for the Tribunal to assess the evidence and make findings. The applicant’s contention is an attempt to revisit the merits of the Tribunal’s reasoning and findings.

21. The applicant argued in oral submissions in relation to this ground that the delegate had given a clear warning to the applicant and the sponsor that the application would be refused. It was argued that the continuation with the application in the face of a clear statement that the application would be refused demonstrated persistence which was a consideration that needed to be taken into account but was not taken into account by the Tribunal in determining this matter. The applicant referred to particular passages of the notes of the interview conducted by Rebecca Cowen with the applicant and the sponsor as follows:

- a) at Court Book 70:

SP: I think we stop interview today – I told you before that I got problem with my wife.

(Sponsor leaves interview...)

- b) at Court Book 72:

NOTES:

Sponsors comments:

When I put it to the Sponsor that I didn’t accept he was in a relationship with the Applicant, he made the following statements in English.

- I really loved her at the start, we had a little problem with the language. We could understand each other in Cantonese. After a few months we communicated little and didn’t get along hardly and I hardly returned home, I stay at friends place a lot.*

(At this point I left the room and returned with DIMIA Officers Thu Bannan – NATA Level 2 Accredited Interpreter in the Vietnamese Language). I explained the situation to Thu and she

endeavoured to speak with the Sponsor in Vietnamese – his first language.

In English, I went over the details of what the Sponsor had told me. He then addressed Thu in Vietnamese. Thu interpreted the following point to me:

- *That the Sponsor had originally been happy in the relationship with the Applicant, but within months of her arrival in Australia they were having problems.*
- *That he considered the relationship to be “Normal” – he said he was not happy at the moments as the parties had financial problems, and he goes out a lot and stays away from the Applicant at home.*

c) at Court Book 73:

RC then asked via Thu whether the relationship had ended.

The Sponsor replied in Vietnamese:

“I just want to tell you before we live together but we have conflicts. Now most of the time I spend at my friend’s place. Maybe in future we patch up relationship again, but I am not sure”

RC and Thu then gave the Sponsor the option of withdrawing his nomination of the Applicant and explained the consequences on this action. RC advised that she would be refusing the application. The Sponsor advised that he would not withdraw his nomination as he believe that later on he and his wife may patch up the relationship. He said “I still want to support her” and “I want to prove the relationship is genuine to you later”. The Sponsor stated “If you give me time – I don’t want to withdraw right now – give me time to fix the relationship”. RC advises that he had three years to build the relationship and that he and his partner have badly contradicted each other on major points. The Sponsor stated that he wanted to think about it. He then agreed to continuing the Interview, but ceased cooperating after about 3 questions.

Once the Sponsor had left the room, the Applicant was recalled and informed of what the Sponsor had said. She denied he didn’t live with her, though she admitted that he stayed away sometimes. Via Cantonese Interpreter, Applicant was given the option of withdrawal. RC sighted examples of discrepancies. The Applicant said:

“We do live together but he doesn’t stay home everyday, Sometime hes (sic) away fro (sic) days and then he comes back”

...

Applicant was given information re withdrawal vs sponsorship and will consider her options.

d) at Court Book 74:

SP repeatedly requested to give him and the applicant more time so that they could try to understand each other and patch up their relationship again. I advised the department had given three years already, whereas in principal, the applicant needed to wait for two years. As per the case officer’s assessment, on the basis of the interview, the application would be one for a refusal as the applicant and sponsor do not meet the regulation 1.15A spouse definition. The sponsor was given the option to withdraw prior to the final assessment of their application. The sponsor stated he would accept whatever the case officer’s decision, as he believed that he and the applicant would overcome their differences and would be living together again. He stated the truth about his relationship would be proven to DIMIA in the future. He added that he would go home and discussed (sic) with the applicant about their relationship. He claimed that if he did not want to support the applicant with this application, he would not be bothered to attend DIMIA office today.

22. The applicant further argued in oral submissions that while it is sometimes difficult to differentiate between a relevant consideration and evidence, the perseverance of the applicant in this case was not a mere piece of evidence. The applicant referred to the decision of the Federal Court in *Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 94 FCR 28 to the effect that the Tribunal has an obligation to determine substantive issues that arise on the materials whether the applicant has raised them himself or not. The applicant also argued that the regulations set out various particular mandatory considerations but also expressly required the Tribunal to take into account all the circumstances of the relationship.
23. The first respondent argued in oral submissions in relation to this ground that the notes of the delegate’s interview were merely a matter of evidence. Reference was made to *Li Shi Ping v Minister for*

Immigration, Local Government and Ethnic Affairs (1994) 35 ALD 225 and *Abebe v The Commonwealth* (1999) 197 CLR 510. The first respondent acknowledged that the Tribunal was required to take into account all of the circumstances of the relationship but argued that there was no indication in the present case that the Tribunal did not take into account the notes of interview.

24. The first respondent pointed out that at paragraph 9 of its reason for decision, the Tribunal stated that it had before it the Departmental case file with folios numbered 1 to 211 and it was clear that those folios included the notes of interview. The first respondent noted that the applicant did not raise this issue before the Tribunal as a matter that should be taken into account. Moreover, the first respondent argued that the applicant's perseverance with his application was a matter going to the merits of the case and argued that it was debatable that persistence with an application demonstrated that the relationship was genuine. It was argued that an applicant and a sponsor who were not in a genuine relationship would know that they could put further information before the Tribunal on review. The first respondent argued that any person who put effort into an application could say that their effort demonstrated a commitment to the marriage but that was not necessarily so. The first respondent argued that, if anything, the Tribunal failed to consider a particular piece of evidence but, in reality, there was nothing to indicate that the Tribunal did not consider that evidence.
25. In reply, the applicant referred to the High Court in *Minister for Immigration, Multicultural & Indigenous Affairs v Yusuf* (2001) 206 CLR 323 and the obligation on the Tribunal to set out its findings on material questions of fact. The applicant argued that if a matter was not mentioned in the Tribunal's reasons for decision, it might indicate that the Tribunal did not take it into account.
26. I accept the first respondent's submissions on this ground. There appears to be no doubt that the notes of the interview with the delegate were before the Tribunal. It is for the Tribunal to give such weight to individual items of evidence as it sees fit. While *Yusuf* does indicate that the Tribunal's failure to mention a particular matter may mean that the Tribunal has not had any regard to that matter, the absence of a

specific reference in the Tribunal's reasons to a particular item of evidence may simply mean that the Tribunal considered it to be so insignificant as to require no weight to be given to it and no mention to be made of it. It was open to the Tribunal to give no weight to, and make no mention of, the applicant's persistence with his claim. Moreover, the applicant did not make any submission to the Tribunal that his persistence with the application demonstrated a genuine commitment to the relationship. In that circumstance also, the Tribunal was not obliged to expressly deal with the point.

27. Additionally, in my view, the applicant's persistence with the application cannot properly be characterised as a claim before the Tribunal. The notes of interview, in my opinion, were no more than a piece of evidence. Moreover, the applicant's persistence with the application is not a circumstance of the relationship but a circumstance of the application. Persisting with an application does not itself indicate that the relationship is genuine. In my view, the Tribunal was not obliged to give any weight to, or mention specifically in its reasons, the evidence about the applicant persisting with the application in the face of the indications from the delegate that the application would be refused. This ground is not made out.

(b): interpreting

28. The particulars of the second aspect of the first ground of review are as follows:

(b) Notes of the Minister's officers of their interview on 3 September 2004 with the applicant and the applicant's husband (Department file OSF 2001/043385 relating to the applicant, folios 181.7, 183.2) showed that there were difficulties with the interpreting of the interview with the sponsor, but the Tribunal failed to have regard to this fact in its consideration of evidence (and inconsistencies of evidence) of the parties in relation to the genuineness of their marriage.

29. The applicant's written contentions on this ground were as follows:

(b) Difficulties with interpreting at Department's interview

[20] The notes of the Minister's officers also revealed difficulties with interpretation at the interview on 3 September 2004. (CB 68.8; cf. 72.4, question 35). The degree of accuracy and ease of communication (or lack of it) at that interview was an important matter because of the inconsistencies of evidence given by the parties at that interview which later were referred to by the Tribunal as inconsistencies to which the Tribunal had regard in making its decision (CB 170.8-171.2, paras 16-17; 177.8, para 40).

[21] While the Tribunal referred also to inconsistencies in other evidence provided directly to it, the Tribunal's reference to inconsistencies in the evidence at the Department's interview, and the adverse view taken by the Minister's delegate, indicates that this was part of the accumulation of inconsistency which led the Tribunal in the end to reject the application. The Tribunal noted that there was no objection to the interpreter at the hearing conducted by the Tribunal (CB 194.3, para 97); it should equally have been alert to the problems with interpreting clearly disclosing in the notes of the interview held by the Minister's officers. This also was a failure to take account of a relevant matter.

30. The first respondent's written submissions on this ground were as follows:

[17] The applicant also contends that the Tribunal failed to have regard to the difficulties with interpretation during the Department interview. [footnote: The difficulties were referred to in the record of interview, which notes that the interpreter had difficulty understanding the sponsor's Cantonese [CB66.7, 68.7]. The delegate subsequently located an accredited interpreter in Vietnamese, the sponsor's first language [CB72.7].]

[17.1] Again, whatever evidentiary weight might be given to such difficulties, they cannot be regarded as a relevant consideration that the Tribunal was required by the Migration Act to take into account.

[17.2] In any event, there is no basis on which it can be said that any interpretation difficulties were material to the Tribunal's decision. The interpretation difficulties do not themselves appear to have explained or justified any of the contradictions or inconsistencies arising from the Departmental interview. Further, the applicant was subsequently given extensive opportunities to address the matters in respect of which discrepancies had arisen (and in

this context did not seek to rely on any interpretation difficulties). [footnote: See, in particular, the joint statutory declaration dated 8 November 2005, in which the applicant and the sponsor sought “to clarify some of the issue in regards to some of the answers we have given during our interview with the Department” [CB103-104, 172]. See also the applicant’s evidence at the Tribunal hearing, referred to in paragraphs 38-41 of the Tribunal’s reasons [CB 177-178].] The Tribunal ultimately relied primarily on inconsistencies arising from the evidence given to the Tribunal, rather than on the Departmental interview. [See, for example, paragraphs 95 and 95 (sic) of the Tribunal’s reasons [CB193-194]. In respect of the inconsistent evidence at the Departmental interview, the Tribunal was prepared to accept the parties’ explanations as plausible, but noted that further inconsistencies had arisen in the evidence to the Tribunal.

[18] Further and alternatively, each of the matters referred to in relation to the Departmental interview was “so insignificant that the failure to take it into account could not possibly have affected the decision”. [footnote: Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24 at 40.]

31. The applicant argued in oral submissions in relation to this ground that the Tribunal had noted at paragraph 16 of its reasons for decision that the applicant and the sponsor had given inconsistent responses to the delegate about who they had lived with, the applicant stating that they had lived with Qing, who she had gone to school with in China, and the sponsor saying that they had lived with Yin, who the applicant had met on the plane to Australia. The applicant also noted that in paragraph 17 of its reasons for decision the Tribunal had noted other discrepancies in the evidence given at the departmental interview relating to the number of flats in the block where they lived, the location of the letter box of the flat and the colour of the bedroom carpet. The applicant said that the Tribunal at paragraph 97 of its reasons for decision acknowledged that there were potential issues with respect to the accuracy of the interpretation of the Tribunal hearing, but the Tribunal was not alive to the standard of interpreting before the delegate and failed to consider whether the standard of interpreting may have led to the apparent discrepancies in the evidence of the applicant and the sponsor. The applicant also referred to paragraph 90 of the Tribunal’s decision where it noted that:

... there are a number of discrepancies in relation to the rent receipts said to have been issued to the visa applicant and the sponsor in respect of the premises where they current claim to reside. The receipts for April 2004, June 2004 and July 2004 are all dated 16 March 2004 and the receipt for June 2004 is not signed.

32. The first respondent argued in oral submissions in relation to this ground that the applicant had not shown that there was any specific misinterpretation at the interview before the delegate that had formed part of the Tribunal's decision. The first respondent said that the applicant had not identified any aspect of the Tribunal's decision where reliance was placed on any discrepancies in the evidence given by the applicant and the sponsor in the interview before the delegate. The first respondent pointed out that at paragraph 95 of the Tribunal's decision it had accepted the explanation given by the applicant and the sponsor regarding the person with whom they lived, whether Qing or Yin, and regarding the layout and the features of the flat. However, the first respondent noted that the Tribunal had noted other inconsistencies which emerged in the evidence given directly to the Tribunal.
33. The first respondent argued that the possible misinterpretation at the interview before the delegate was not a relevant consideration in the *Peko-Wallsend* sense (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).
34. In reply, the applicant said that the Tribunal's task was to review the delegate's decision and, accordingly, the conduct of the interview by the delegate was a relevant consideration for the Tribunal.
35. I note that at paragraph 103 of its reasons for decision, the Tribunal referred to "the number of discrepancies in the parties' evidence in relation to their living arrangements" and at paragraph 112, the Tribunal referred to "the inconsistencies in the evidence discussed previously". However, given that there were inconsistencies in the evidence that was provided to the Tribunal itself and given that the Tribunal appears to have accepted the parties' explanation for the inconsistencies in the evidence given to the delegate, I am not satisfied that the Tribunal actually relied upon any of the inconsistencies or discrepancies in the evidence given by the applicant and the sponsor to the delegate.

36. Moreover, there was nothing before this court to indicate that any discrepancies in the evidence given before the delegate were the result of interpretation difficulties. There was no transcript of the interview before the delegate and no expert evidence about what was actually said by each of the applicant and the sponsor and the respect in which their statements were misinterpreted by the interpreter. In these circumstances, the court is unable to conclude that there was any misinterpretation at all of any evidence that was identified as an inconsistency or discrepancy. This ground is not made out.

(c): responsibility for sponsor's children

37. The particulars of the third aspect of the first ground of review are as follows:

(c) The Tribunal did not, in breach of Regulation 1.15A (3)(b) (i), have regard to the issue of responsibility for the children of the sponsor.

38. The applicant's written contentions on this ground were as follows:

(c) Responsibility for the sponsor's children

[22] The Tribunal failed to have regard to the issue of responsibility for the children of the sponsor, although this was a matter made relevant by Regulation 1.15A(3)(b)(i).

39. The first respondent's written submissions on this ground were as follows:

[21] The applicant contends that the Tribunal failed to have regard to the issue of responsibility for the sponsor's children (from his past relationship), which was made relevant by reg 1.15A(3)(b)(i).

[22] Reg 1.15A(3)(b)(i) requires the decision-maker to have regard to the nature of the household, including "any joint responsibility for care and support of children, if any" (emphasis added). In the present case, however, the applicant and the sponsor did not claim to have any joint responsibility for the sponsor's children. The evidence of the applicant was that the sponsor's former spouse had custody of the children, and that she did not go with the sponsor when he visited his children [CB 178.4].

[23] Not every sub-paragraph of reg.1.15A(3)(a), (b), (c) and (d) will be relevant to the facts of the particular case. The Tribunal is not required to take into account a matter set out in reg.1.15A(3) where that matter is not raised on the facts.

[24] Further, there is no requirement that the Tribunal must make discrete findings on each of the matters set out in reg.1.15A(3). Thus in Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686 at [35], Dowsett J stated:

Although subreg 1.15A(3) requires that the Minister ‘have regard to all the circumstances of the relationship including’ the various matters specified, it does not require that the Tribunal make specific findings concerning any of those matters. To the extent that the material dealt with these matters, the Tribunal appears to have considered them and recorded substantial amounts of the relevant material in its reasons. There is no obligation upon a tribunal of fact to make findings as to whether it accepts or rejects every allegation made in the course of evidence. In some cases allegations may be so fundamental to the ultimate matter for determination that findings concerning them will be essential. In most cases, however, individual facts will be of less significance than the overall effect of the evidence. ... At the end of the day the questions for determination in the present case were whether the Tribunal was satisfied that:

- the applicant and Mr Davis, as at the date of application for a visa, had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- the relationship was genuine and continuing.

Both questions required an assessment of the subjective state of mind of each party to the marriage. The Tribunal clearly addressed that issue and explained its decision by reference to the evidence. It was obliged to do no more.”

40. The applicant argued in oral submissions in relation to this ground that although the children in this case were in the custody of their mother, who was the sponsor’s former partner, there was a question of the matter of contact between the applicant and the sponsor’s children given that there was some evidence that she visited them on occasions.
41. The first respondent argued in oral submissions in relation to this ground that the question of any joint responsibility for the care and

support of any children did not arise in this case. Joint responsibility for children was a matter for the parties to raise. The first respondent said that until the interview with the delegate, the applicant did not even know that the sponsor had children. The first respondent referred to paragraph 42 of the Tribunal's reasons for decision which set out the visa applicant's evidence in relation to the sponsor's children. That paragraph relevantly reads as follows:

The visa applicant could not recall when she was first introduced to the sponsor's two children and she said that she does not see them often. She informed the Tribunal that she saw the sponsor's children at New Year's Eve celebrations and, most recently, at a birthday party that was held in October 2005 because both the visa applicant and the sponsor share birthdays one day apart. The visa applicant gave evidence that the sponsor's former spouse has custody of his two children and that she does not go with the sponsor when he visits his children. The visa applicant said that the sponsor's daughter, aged 13 years, was called "Linh" and his son, aged 10 years, was named "Thanh", but she did not know which grades they were in school.

42. On the evidence presented, it cannot be said that there was any joint responsibility for the sponsor's children. The applicant saw the children rarely and did not go with the sponsor when he visited his children. The sponsor's children were in the care of their mother. In these circumstances, it cannot be said that there was any joint responsibility shared by the applicant and the sponsor for the sponsor's children from a previous relationship. In these circumstances, there was no obligation on the Tribunal to expressly deal with the question of any joint responsibility for children because it simply did not arise. There was no joint responsibility in this case and none was asserted. As Dowsett J said in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686, there is no obligation on the Tribunal to make specific findings on any of the matters set out in reg. 1.15A(3). I also note that the question of any joint responsibility for the care and support of children, if any, falls under the heading of the nature of the household. In the present case, there were no children living in the household, or, it appears, staying on occasion in the household. This ground is not made out.

(d): duration of the relationship

43. The particulars of the fourth aspect of the first ground of review are as follows:

(d) The Tribunal failed to have regard to the duration of the relationship at the time of decision, by which time it was approximately five and a half years since their marriage, although this was a matter made relevant by Regulation 1.15A(3)(d)(i).

44. The applicant's written contentions on this ground were as follows:

(d) Duration of the relationship

[22] The Tribunal failed to have regard to the duration of the relationship at the time of decision, by which time it was approximately five and a half years since their marriage, although this was a matter made relevant by Regulation 1.15A(3)(d)(i).

45. The first respondent's written submissions on this ground were as follows:

[25] The applicant contends that the Tribunal failed to have regard to the duration of the relationship at the time of decision, which was made relevant by reg.1.15A(3)(d)(i). [footnote: Reg 1.15A(3)(d)(i) requires the decision-maker to have regard to the nature of the persons' commitment to each other, including "the duration of the relationship".]

[26] The Tribunal referred to the fact that the applicant and the sponsor were married on 1 March 2001 [CB168.5, 189.8]. It cannot be said that the Tribunal was not aware of the duration of the relationship, in the sense of the period for which the applicant and the sponsor had been married. However, the evidence raised significant doubts as to whether the relationship was genuine and continuing. As a consequence, the Tribunal addressed the nature of the persons' commitment to each other together with the question whether the relationship was genuine and continuing [CB 197-199, paras 116-122].

[27] Accordingly, the Tribunal did not fail to have regard to the nature of the parties' commitment, including the duration of the relationship, in accordance with reg.1.15A(3)(d)(i).

46. The applicant said in oral submissions in relation to this ground that the relationship had lasted for five and a half years at the time of the Tribunal's decision and this fact went to the genuineness of the relationship.
47. The first respondent pointed out that in paragraph 10 of its reasons for decision, the Tribunal noted that the applicant and sponsor were married in China on 1 March 2001. As the decision was signed on 21 August 2006, that meant that at the time of decision, the parties had been married for five and a half years. The first respondent said that by noting the date of marriage, the Tribunal demonstrated that it was aware of the duration of the marriage. The first respondent argued that the duration of the marriage did not in itself mean that it was genuine. The first respondent also argued that the Tribunal did not proceed on a misapprehension about the duration of the marriage.
48. In reply, the applicant said that the mere mention of the date of the marriage is not enough to show that the duration of the marriage was taken into account. The applicant conceded that the length of the marriage gave rise to a question of weight.
49. It is clear from regulation 1.15A(3)(d)(i) that the duration of the relationship is a matter to which the Tribunal must have regard in considering the nature of the persons' commitment to each other. The regulation directs attention to the relationship as opposed to the formal marriage. Under the heading "the nature of the persons' commitment to each other and whether the relationship is genuine and continuing", the Tribunal noted at paragraph 116 of its reasons for decision that it had had regard to the documentary evidence submitted in support of the application. That included, among other things, the Form 40SP which set out the date of marriage. The Tribunal correctly set out the date of marriage at paragraph 10 of its reasons for decision. In these circumstances, there is no reason to suppose that the Tribunal did not take into account and give the weight it saw fit to the duration of the formal marriage.
50. Moreover, the applicant and sponsor spent a considerable period of the time that they were married living separately and apart. The record of the delegate's interview with the applicant and the sponsor included the following:

- *That the Sponsor had originally been happy in the relationship with the Applicant, but within months of her arrival in Australia they were having problems.*
- *That he considered the relationship to be “Normal” – he said he was not happy at the moments as the parties had financial problems, and he goes out a lot and stays away from the Applicant at home.*

51. The sponsor was also recorded as saying:

I just want to tell you before we live together but we have conflicts. Now most of the time I spend at my friend's place. Maybe in future we patch up relationship again, but I am not sure.

52. The Tribunal noted at paragraph 36 of its reasons for decision that the applicant had given evidence to the Tribunal that the applicant and sponsor had lived apart from a few weeks after they moved to James Street, Box Hill until August or September 2004. The Tribunal also noted that the sponsor gave evidence to the Tribunal (paragraph 51) that the applicant and the sponsor had lived apart from shortly after they moved to James Street, Box Hill until September or October 2004. The applicant said that they had resumed cohabitation before the departmental interview in September 2004 whereas the sponsor said that they had resumed cohabitation “definitely after the departmental interview in September 2004”.

53. The Tribunal also noted at paragraph 109 of its reasons for decision that:

[109] Following a departmental home visit conducted in July 2004, it emerged that the parties had separated. The visa applicant and the sponsor have not denied that they parted shortly after moving to James Street, Box Hill in March 2004, but claim that they were experiencing marital difficulties at the time, that their separation was only temporary and that they have since reconciled their differences.

54. At paragraph 118 of its reasons for decision, the Tribunal said:

As regards the timing of the visa applicant's reconciliation with the sponsor shortly after the Departmental interview took place, both the visa applicant and the sponsor claim to have reconciled

their relationship in late 2004 and to be in a committed relationship at the time of decision.

55. From this material, it is clear that the Tribunal had regard to the duration of the relationship between the parties as opposed to the duration of their formal marriage. Although the parties were formally married from 1 March 2001, their relationship, on their own evidence, involved a substantial period when they were estranged. There is no obligation on the Tribunal to consider the length of the formal marriage between the parties. What is relevant is the duration of the period when the parties were in a relationship as husband and wife. The Tribunal clearly took this into account. This ground is not made out.

(e): separately and apart on a permanent basis

56. The particulars of the fifth aspect of the first ground of review are as follows:

(e) The Tribunal said at [112] that:

“... the Tribunal finds that the evidence that the parties are living together at the time of the decision is not particularly strong”,

but did not ask, as Regulation 1.15A(1A)(b)(iii)B required, whether they “do not live separately and apart on a permanent basis”.

57. The applicant’s written contentions on this ground were as follows:

(e) Were the parties living separately and apart on a permanent basis?

[24] The Tribunal, having found that the evidence that the parties are living together at the time of decision is not particularly strong (CB 197, para 12) did not then ask whether the parties “do not live separately and apart on a permanent basis” although this was a relevant question pursuant to Regulation 1.15A(1A)(b)(iii) (B).

58. The first respondent’s written submissions on this ground were as follows:

[28] In order for the applicant to be the spouse of the sponsor, the Tribunal was required to be satisfied that the applicant and the sponsor lived together, or did not live separately and apart on a permanent basis: reg 1.15A(1A)(b)(iii).

[29] The distinction between these two alternatives would only be of significance in those cases where, although the parties were not living together at the time of the decision, they were not living separately and apart on a permanent basis. For example, one of the parties might temporarily be living interstate or overseas, for example, for work purposes. There is no suggestion of any such circumstances in the present case.

[30] The Tribunal referred to this criterion under the heading “whether the persons live together, or do not live separately and apart on a permanent basis” [CB197.1]. The Tribunal referred to the evidence “that the parties live together and do not live separately and apart on a permanent basis” [CB197.3]. However, the Tribunal found that “the evidence that the parties are living together at the time of decision is not particularly strong” [CB 197.5]. The Tribunal went on to note that the fact that correspondence was addressed to the applicant and the sponsor at the same address did not necessarily establish that the applicant and the sponsor resided and continued to reside at the same address at the time of decision [CB197.7].

[31] On a fair reading of the Tribunal’s reasons for decision, it should be taken as having approached the matter on the basis that, if the applicant and the sponsor were not living together at the time of decision, they were living separately and apart on a permanent basis. This approach was justified in circumstances where no suggestion was made that the applicant and the sponsor were living separately and apart on a temporary basis.

[32] In any event, the Tribunal’s decision was not based on a finding that the applicant did not satisfy reg 1.15A(1A)(b)(iii). Rather, the Tribunal found that the relationship between the applicant and the sponsor was not genuine and continuing as required by reg 1.15A(1A)(b)(ii), and that the applicant and the sponsor did not have a mutual commitment to a shared life as husband and wife to the exclusion of all others as required by reg 1.15A(1A)(b)(i) [CB199.9, 200.1]. Accordingly, any failure by the Tribunal to refer to or make a finding in relation to the question whether or not the applicant and the sponsor lived separately and apart on a permanent basis had no material effect on the Tribunal’s decision, which was independently supported by other findings.

59. The applicant in oral submissions reiterated the written submissions and said further that paragraphs (A) and (B) of regulation 1.15A(1A)(b)(iii) were alternatives but, otherwise, the matters set out in reg.1.15A(1A)(b)(iii) were cumulative. The first respondent argued that the question of whether the parties were not living separately and apart on a permanent basis only arises where the parties are not living together. In reply, the applicant argued that the Tribunal was inquisitorial and accordingly, it was not necessary for the applicant to raise the question of the parties not living separately and apart on a permanent basis.
60. The matters set out in regulation 1.15A(1A) are cumulative except that the matters set out in subparagraph (iii) are alternatives. The result is that two persons will not be in a married relationship if the Minister is not satisfied that they have the requisite mutual commitment or if the Minister is not satisfied that the relationship between them is genuine and continuing, or if the Minister is not satisfied that they live together or do not live separately and apart on a permanent basis. In this case, the Tribunal was not satisfied that the applicant and the sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others and was not satisfied that the relationship between them was genuine and continuing at the time of decision. Accordingly, any failure by the Tribunal to consider whether the applicant and the sponsor lived separately and apart on a permanent basis would not have affected the decision.
61. In any event, it seems to be implicit in paragraph 112 of the Tribunal's decision, which is set out at paragraph 12 above, that the Tribunal was not satisfied that the parties were not living separately and apart on a permanent basis. The Tribunal was not persuaded that they were living together, contrary to their claim. They did not claim that they were not living together because they were temporarily living apart. In these circumstances, there was no need for the Tribunal to expressly consider that possibility. This ground is not made out.

Ground 2: irrelevant considerations

62. The second ground of review is as follows:

2. *The decision was affected by jurisdictional error in that the Tribunal had regard to an irrelevant consideration or considerations.*

(a) whether the parties were required to have combined their financial affairs

63. The particulars of the first aspect of the second ground of review are as follows:

- (a) *The Tribunal had regard to irrelevant matters and misinterpreted the law in concluding at [91]-[92] that:*

“... ..the Tribunal does not find this evidence particularly persuasive of the parties’ claims to have combined their financial affairs...”

“... the financial aspects of the parties relationship at the time of decision have not been established”,

but Regulation 1.15A(3)(a) does not impose any requirement that the parties claiming to be spouses have combined their financial affairs.

64. The applicant’s written contentions on this ground were as follows:

[25] The Tribunal concluded as noted above that it did not find evidence particularly persuasive of “the parties’ claims to have combined their financial affairs... the financial aspects of the parties’ relationship at the time of decision have not been established”, but Regulation 1.15A(3)(a) does not impose any requirement that the parties’ claiming to be spouses have combined their financial affairs.

65. The first respondent’s written submissions on this ground were as follows:

[34] Reg 1.15A(3)(a) requires the Tribunal to have regard to the financial aspects of the relationship, including joint ownership of any assets and joint liabilities, pooling of financial resources, and sharing of day-to-day household expenses. More generally, the matters set out in reg 1.15A(3) are not exhaustive of the matters to which the Tribunal may have regard. The Tribunal must have regard to “all of the circumstances of the relationship.”

[35] Accordingly, it was appropriate for the Tribunal to have regard to “the parties’ claims to have combined their financial affairs” (emphasis added) [192.9]. This was not an irrelevant consideration that the Tribunal was bound not to take into account. On a fair reading of the Tribunal’s reasons [footnote: Minister for Immigration and Ethnic Affairs v. Wu Shan Liang (1996) 185 CLR 259 at 271-272, 291], it did not impose any discrete requirement that the applicant and the sponsor must have combined their financial affairs in order for the applicant to meet the definition of “spouse” in reg 1.15A.

66. The applicant argued in oral submissions in relation to this ground that paragraphs 91 and 92 of the Tribunal’s reasons for decision, which are set out at paragraph 9 above, suggest that the Tribunal considered that there are particular arrangements which are required to be established for a genuine relationship to exist. The applicant argued that the regulations merely required the Tribunal to consider all of the circumstances of the relationship and make an assessment about whether it is genuine on the basis of the totality of the evidence. The applicant argued that the Tribunal proceeded on the basis that it was necessary for the parties to establish that they had a particular financial arrangement when the regulations required no such thing. The applicant argued that the absence of pooled financial affairs would only amount to a weakness in the applicant’s case, but not a fatal flaw.
67. The court referred the applicant to paragraph 124 of the Tribunal’s reasons for decision which is set out at paragraph 16 above. The applicant argued that the reference to significant gaps in the evidence highlighted that the Tribunal expected more to be established by the applicant than the regulations require. Moreover, the applicant argued that the Tribunal’s reference to the financial aspects of the relationship, the nature of their household, and their long term commitment to the relationship were all undermined, in the applicant’s submission, by the Tribunal’s failure to take into account relevant considerations and by its taking into account irrelevant considerations.
68. The first respondent submitted that paragraph 92 of the Tribunal’s reasons for decision needed to be understood in light of paragraph 91. On a fair reading, in the first respondent’s submission, the Tribunal meant in paragraph 92 that it found that the applicant’s *claims* about the financial aspects of the parties’ relationship had not been

established. The first respondent argued that the Tribunal did not impose any requirement that was inconsistent with the regulations and did not say at any stage that there must be any particular arrangement to satisfy the requirements of the regulations. The first respondent submitted that paragraph 124 of the Tribunal's reasons for decision indicated that the various factors set out in sub-regulation 1.15A(3) were not indicative of a spousal relationship and, overall, the Tribunal was not satisfied that the relationship between the applicant and the sponsor was genuine and continuing.

69. In reply, the applicant submitted that the first respondent's oral submissions were ingenious but strained.
70. In my view, it is clear that the matters set out in regulation 1.15A(3) are not tests which must be satisfied for a person to qualify for a spouse visa and are not in themselves criteria for a spouse visa. The matters set out in sub regulation 1.15A(3) are matters to which the Tribunal must have regard in forming an opinion whether two people are in a married or de facto relationship.
71. The matters that must exist for two people to be in a married relationship are set out in sub regulation 1.15A(1A) of the regulations. Those matters are a valid marriage and the Minister or other decision maker being satisfied that the relevant persons have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that they have a relationship that is genuine and continuing, and that they live together or not living separately and apart on a permanent basis.
72. The matters set out in sub regulation 1.15A(3) are simply matters that may indicate that a relationship of the required sort exists. However, there could well be genuine and continuing relationships with the appropriate mutual commitment where none of the matters set out in regulation 1.15A(3) were in evidence to any substantial degree. An example is to be found in the story of Romeo and Juliet. They did not combine their financial affairs. They did not share a household. Their relationship was secret. Their relationship was extremely brief. They never lived together. Nevertheless, they were married and they were mutually committed to a shared life as husband and wife to the exclusion of all others. Their relationship was genuine and it could be

supposed that it would have been continuing but for a tragic misunderstanding.

73. The case of Romeo and Juliet illustrates the point that the matters set out in reg.1.15A(3) of the regulations are not tests that must be passed to establish a genuine and committed relationship, but merely matters to be taken into account. Accordingly, it is clear that if the Tribunal had taken the view that, to meet the criteria, the applicant must have pooled her financial affairs with the sponsor's, the Tribunal would have fundamentally misconstrued the regulations and the Tribunal's decision would have involved jurisdictional error.
74. Paragraph 92 of the Tribunal's reasons for decision taken in isolation might suggest that the Tribunal considered that the applicant and the sponsor were required to establish a particular sort of financial arrangement for them to satisfy the regulations. However, paragraph 91 of the Tribunal's reasons for decision refers to the "parties' claims to have combined their financial affairs". In my view, a fair reading of paragraph 92 is that the parties have not made out their claims to have combined their financial affairs.
75. This conclusion is reinforced by the Tribunal's statement at paragraph 124 of its reasons that:

"the Tribunal considers that the factors set out in 1.15A(3) are not indicative of a spousal relationship at the time of decision. In light of the evidence, the Tribunal is not satisfied that the relationship between the visa applicant and the sponsor is genuine and continuing at the time of decision."
76. The passage cited from paragraph 124 indicates that the Tribunal regarded the matters set out in sub-regulation 1.15A(3) of the regulations as being potential indicators of a spousal relationship, but not tests of whether a spousal relationship actually existed. The Tribunal referred to the "evidence" and on the basis of the "evidence", the Tribunal concluded that it was not satisfied that the relationship was genuine and continuing. In light of these statements, I am not satisfied that the Tribunal was under the fundamental misapprehension that was alleged by the applicant. This ground is not made out.

(b): whether the parties were required to share a genuine household

77. The particulars of the second aspect of the second ground of review are as follows:

(b) The Tribunal had regard to irrelevant matters and misinterpreted the law in concluding at [103] that:

“... ..the Tribunal is not satisfied that this evidence establishes that the parties have shared and continue to share a genuine household at the time of decision”,

but Regulation 1.15A(3)(a) does not impose any requirement that the parties claiming to be spouses “have shared and continue to share a genuine household.”

78. The applicant’s written contentions on this ground were as follows:

[26] The Tribunal further found at paragraph 103 of the decision (CB 196.1) that the Tribunal was not satisfied that evidence established that the parties have shared and continue to share a genuine household at the time of decision but the Regulation does not impose any requirement that spouses “have shared and continue to share a genuine household”.

79. The first respondent’s written submissions on this ground were as follows:

[36] Similarly, the Tribunal was permitted to consider whether the applicant and the sponsor had shared a “genuine household” [CB196.1]. Reg 1.15A(3)(b) required the Tribunal to consider the nature of the household, including the parties’ living arrangements and any sharing of responsibility for housework. Further, the Tribunal was required by reg 1.15A(3) to have regard to “all of the circumstances of the relationship”. On a fair reading of the Tribunal’s reasons, it did not impose a requirement that the applicant and sponsor must share a genuine household. It was simply one of the matters that the Tribunal took into account in reaching its finding that the relationship between the applicant and the sponsor was not genuine and continuing at the time of decision.

80. The applicant in oral submissions referred to the last sentence of paragraph 103 which reads as follows:

However, on balance, given the number of discrepancies in the parties' evidence in relation to their living arrangements, the Tribunal is not satisfied that this evidence establishes that the parties have shared and continue to share a genuine household at the time of decision.

81. The applicant argued that the Tribunal had taken the word “genuine” from the requirement to have a genuine relationship and had thus misconstrued the relevant regulation.
82. The first respondent argued that it was not a fair reading of paragraph 103 of the Tribunal’s reasons for decision to seize upon the word “genuine” and conclude that the Tribunal had been under some misapprehension about the meaning of the regulations. The first respondent said that was particularly so in light of paragraph 124 of the Tribunal’s reasons for decision. The first respondent argued that the Tribunal meant if the parties had lived together at the time, it was not as spouses as defined.
83. In my view, the Tribunal’s use of the word “genuine” in paragraph 103 of its reasons for decision is not indicative of any misapprehension about the meaning of the regulations. On a fair reading, that paragraph merely meant that the Tribunal was not satisfied that the applicant and the sponsor had really shared a household as spouses. That was a circumstance of the relationship that the Tribunal was entitled to take into account. It was not an irrelevant consideration. Moreover, there is no basis for a conclusion that the Tribunal proceeded on the mistaken view that the applicant and the sponsor must have shared a genuine household for their application to succeed. I repeat the matters stated above in relation to ground 2(a) and particularly in relation to paragraph 124 of the Tribunal’s reasons for decision. This ground is not made out.

Ground 3: duty to enquire

84. The third ground of review is as follows:

3. *The conduct was affected by jurisdictional error in that the Tribunal failed to exercise powers as required by law.*

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The Tribunal noted that it had folios 1-211 of the Minister's Department's file OSF 2001/043385 relating to the applicant, but did not exercise its powers under sections 359, 359B, 363 or other powers under the Act to make inquiries concerning:

- (a) details of the conversations between the Minister's officers and the applicant and the sponsor concerning the options of the applicant withdrawing her application or of the sponsor withdrawing his sponsorship;*
- (b) difficulties with the interpreting of the interview by the Minister's officers of the sponsor.*

85. The parties accepted that the Tribunal has no general duty to enquire but that there may be rare and exceptional circumstances where the ready availability of information critical to the review can enliven a duty to enquire: *Prasad v Minister for Immigration & Ethnic Affairs* (1985) 6 FCR 155 and *Luu v Renevier* (1989) 91 ALR 39 at 50. The applicant argued that this was such a case, and said in written submissions that:

[32] The Tribunal did not take simple steps available to test possibly very strong evidence of commitment by the parties to the marriage in the face of vigorous opposing advice by officer's (sic) of the Minister's Department, and possibly important evidence of difficulties with interpreting at the Department interview by making or causing inquiries under section 359 or 363 to get evidence from or about the Minister's officers and their conduct. Yet this evidence could have been critical to the review by the Tribunal. The Tribunal was not persuaded of the genuineness of the marriage; had it obtained further information about the Department's interview, it may have concluded that some inconsistencies were explained or less serious, and it may have concluded that there was strong evidence of strong commitment to the marriage in the face of official opposition.

[33] In the circumstances of the present case the Tribunal thus failed to seek (sic) information and failed to act as required by the law which was the basis of its jurisdiction.

86. The first respondent argued in written submissions that:

[20] Each of the powers conferred by ss.359, 359B and 363 is facultative. The Tribunal was not under any duty to exercise

those powers to obtain any particular information. The Tribunal is not under any general duty to make inquiries. In the present case, it cannot be said that it was obvious that there was additional material that was readily available which was centrally relevant to the Tribunal's decision. [footnote: Cf: Prasad v Minister for Immigration & Ethnic Affairs (1985) 6 FCR 155 at 170; Luu v Renevier (1989) 91 ALR 39; see also Foxtel Management Pty Ltd v Australian Competition and Consumer Commission (2000) 173 ALR 362 at 417; Rahman v Minister for Immigration and Multicultural Affairs [2000] FCA 1277 at [29]-[31]; Azzi v Minister for Immigration and Multicultural Affairs [2002] FCA 24 at [102]-[114]; Luu v Minister for Immigration and Multicultural Affairs [2001] FCA 1136 at [95]-[99]; Luu v Minister for Immigration & Multicultural Affairs [2002] FCAFC 369 at [28], [50]-[54].] Significantly, the applicant has not identified any such material. [footnote: See applicant's contentions, para 32. The applicant refers to the Tribunal's failure to "take simple steps available to test possibly very strong evidence of commitment by the parties to the marriage", and "possibly important evidence of difficulties with interpreting at the Department interview". The Tribunal was not under a duty to take unspecified steps to "test" evidence before it.] Accordingly, this is not one of the "rare" or "exceptional" cases in which it may be unreasonable or unfair for the Tribunal to proceed without taking steps to obtain further information.

87. The applicant argued in oral submissions that the Tribunal could easily have made inquiries about the interpretation before the delegate and the question of perseverance in maintaining the application in the face of a certain refusal.
88. The first respondent said in oral submissions that all of the relevant material in relation to the alleged failure to inquire was in the departmental notes of interview; there was nothing further for the Tribunal to inquire about. Additionally, the first respondent distinguished this case from *Prasad* where the decision maker knew there was an expert psychological report in existence that was available for the asking but did not take the simple step of asking for it to be made available to the Tribunal. In the present case, in the first respondent's submission, there was no concrete, readily available material that the Tribunal could have obtained.

89. In relation to the interpretation difficulties before the delegate, the first respondent pointed out that the Tribunal had asked the applicant for an explanation and had been provided with one, which the Tribunal accepted. The first respondent argued that there was no simple step that could have been taken in this case to make inquiries about the matters nominated. Moreover, the first respondent argued that the issue of the duty to inquire was in reality a subset of the relevant considerations ground because if the matters nominated as subjects about which the Tribunal ought to have inquired were not relevant considerations, then there could have been no duty to inquire about them.
90. In the applicant's submissions in reply, the applicant argued that the duty to inquire was not necessarily tied to the relevant considerations point because the duty to inquire may have been connected with credibility issues which were a separate matter. The applicant argued that under s.363(1)(d) of the Act, the Tribunal could have required the Secretary of the Department to arrange for an investigation and could have sought a report from the Secretary. Additionally, the applicant argued under s.363(3) of the Act, the Tribunal may have summoned witnesses itself, such as the delegate and the interpreter at the interview conducted by the delegate. The Tribunal could have asked what was said and what was the extent of the difficulty with the interpretation.
91. On the assumption that there is a residual duty to inquire where there is information critical to the review that is readily available, I am not satisfied that there was any duty to inquire in this case. The summoning of witnesses is not, as I understand it, the sort of simple step that was contemplated in *Prasad*. There was no concrete, self-contained, readily available information that would have definitively resolved an issue in the proceeding.
92. Moreover, the inquiries that the applicant submits ought to have been made were about interpretation of evidence at the hearing before the delegate and the applicant's persistence in the face of a certain rejection with his application for review. For the reasons stated above in relation to the alleged failure to take into account relevant considerations, these matters cannot be described as critical to the review or even central to the review. For this reason also, the inquiries which are nominated do

not fall within the rare and exceptional category of cases where the residual duty to inquire might arise. This ground is not made out.

Ground 4: invalidity

93. The fourth ground of review is as follows:

4. *The Tribunal based the decision on the application of a regulation which was wholly or partly invalid.*

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To the extent that Regulation 1.15A purports to add an additional requirement to a valid marriage for the existence of a spousal relationship, it is inconsistent with the provisions of the Marriage Act 1961 and invalid.

94. The applicant's written contentions on this ground were as follows:

[34] In the alternative to Grounds 1 and 3 herein, and in addition to Ground 2 herein, the applicant submits that Regulation 1.15A is partly or wholly invalid, so far as it purports to impose an additional requirement to a valid marriage for the existence of a spousal relationship.

[35] This is because the Marriage Act 1961 provides at section 5 that for the purposes of that Act "marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life. Section 48 of that Act provides for conditions which invalidate a marriage solemnized in Australia. The Act is generally concerned also with necessary conditions and permissions for the solemnization of marriages and thus with their validity.

[36] By contrast the Migration Act 1958 states in section 4 that it has the following object:

"The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens."

[37] There is no suggestion of any intention by the Parliament to define marriage or provide for its definition under the Migration Act 1958.

[38] "Spouse" means husband or wife. (Cf. e.g. definition in the Oxford English Dictionary). Therefore Regulation 1.15A is necessarily defining requirements for a marriage. To the extent

that Regulations 1.15A purports to add an additional requirement to a valid marriage for the existence of a spousal relationship, it is thus inconsistent with the provisions of the Marriage Act 1961 and invalid.

[39] Thus the Tribunal's rejection of the application was based on the application of an invalid regulation and therefore attended by jurisdictional error.

[40] The applicant notes that this argument was made by the applicant, but rejected by the Federal Magistrates' Court in a recent judgment of Riley F.M. in Halkic v Minister for Immigration and Multicultural Affairs and the Migration Review Tribunal. The applicant is not aware of any other authority on the point, but respectfully submits, for the reasons here given, that on the point the Court in Halkic was incorrect and should not be allowed.

95. The first respondent's written submissions on this ground were as follows:

[38] This ground proceeds on a misconception as to the operation of reg 1.15A, which does not address the requirements for a valid marriage in Australia, nor the requirements for recognition of a foreign marriage in Australia. Rather, reg 1.15A simply defines the meaning of the term "spouse" for the purposes of the Regulations, that is, for the purposes of the criteria prescribed by the Migration Regulations, such as clause 100.221(2)(b) in Schedule 2. For such purposes, the ordinary or dictionary definition of "spouse" is irrelevant.

*[39] Reg 1.15A(1A)(2)(a) requires that the parties must be "married to each other under a marriage that is recognised as valid for the purposes of the Act". In this regard, s.12 of the Migration Act 1958 provides that "[f]or the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the Marriage Act 1961 applies as if section 88E of that Act were omitted". [footnote: Part VA of the Marriage Act 1961 deals with the recognition of foreign marriages, and s.88E deals with the application of the common law rules of private international law.] Section 12 of the Migration Act otherwise appears to assume that the recognition of valid marriages (including the validity of marriages solemnised in Australia) is governed by the provisions of the Marriage Act 1961. [footnote: see *Sevim v Minister for Immigration and Multicultural Affairs* [2001] FCA 1597 at [12]-[13] (Gray J).]*

[40] In order to be a “spouse” within the meaning of reg 1.15A, it is not sufficient for the applicant to be married to the sponsor under a marriage that is recognised as valid. The applicant and the sponsor must also meet the requirements set out (sic) reg 1.15A(1A)(b). However, this is only relevant for the purposes of the visa criteria prescribed by the Migration Regulations. Such a regulation is supported by the power conferred by s.31(3) of the Migration Act, which provides that “[t]he regulations may prescribe criteria for a visa or visas of a specified class”. Nothing in reg 1.15A(1A) detracts from the validity of a marriage made or recognised under the Marriage Act 1961, or is otherwise inconsistent with that Act.

[41] A similar challenge to the validity of reg 1.15A was rejected by this Court in Halkic v Minister for Immigration and Multicultural Affairs [footnote: [2006] FMCA 1646 at [52]-[61].] As the Court stated in that case, “there is no inconsistency between a regulation which requires that a relationship between visa applicants must be genuine for the visa to be granted and the Marriage Act 1961 which specifies the circumstances in which a marriage will be valid.”

96. In oral submissions in relation to this ground, the applicant relied upon s.12 of the *Migration Act* which provides that:

For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the Marriage Act 1961 applies as if section 88E of that Act were omitted.

97. Section 88E of the *Marriage Act 1961* deals with the recognition of certain foreign marriages. The applicant argued that s.12 of the *Migration Act* made it clear that recognition of the validity of marriages is given to the *Marriage Act* and is not a matter within the purview of the *Migration Act*.
98. The first respondent relied on my decision in *Halkic v Minister for Immigration & Anor* [2006] FMCA 1646 and argued that it should be followed for reasons of comity unless I were satisfied that it is plainly wrong. The first respondent argued that *Halkic* was plainly correct. The first respondent argued further that regulation 1.15A does not address the validity or recognition of foreign marriages and argued that s.12 of the *Migration Act* was irrelevant. The first respondent argued that that section only goes to the question of whether the relevant

people were validly married. The first respondent noted that s.31(3) of the *Migration Act* allows the regulations to prescribe criteria for a particular class of visa.

99. In reply, the applicant argued that the regulations were incoherent in that they required a spouse to be something more than a married person. The applicant further argued that it was clear from the *Marriage Act 1961* and the *Migration Act 1958* that the Parliament intended that it was a matter for the Parliament to decide what a marriage is and who is a party to a marriage, and it is not for an administrator to decide those questions.
100. In my view, my decision in *Halkic* was correct for the reasons there given. I do not consider that s.12 of the *Migration Act 1958* detracts from the conclusions reached in *Halkic*. The fact remains that the regulations require that for a person to be eligible for a spouse visa, he or she must either be in a valid marriage or a de facto relationship and must, in addition, have a mutual commitment to a shared life as husband and wife to the exclusion of all others and must, in addition, be in a relationship that is genuine and continuing and must, in addition, either live with his or her partner, or not live separately and apart from him or her on a permanent basis. There is no inconsistency between the *Marriage Act* which stipulates the circumstances under which a marriage will be valid, and a regulation that stipulates when a spouse visa will be granted. There is no reason the criteria for a spouse visa should be confined to a valid marriage. In my view, there is no inconsistency between the *Marriage Act 1961* and reg.1.15A of the Regulations. I note that after this matter was argued, Federal Magistrate McInnis handed down his decision in *Le & Ors v Minister for Immigration & Anor* [2007] FMCA 427. In that case, at [117-9], his Honour upheld the validity of regulation 1.15(1A). This ground is not made out.

The effect of any invalidity

101. At the conclusion of the hearing before this court, there was argument about the effect of the applicant succeeding in the claim that the regulations were invalid. When asked, the applicant submitted that reg.1.15A(1A)(a), which provides that persons are in a married

relationship if they are validly married to each other, was a valid regulation and reg.1.15A(1A)(b), which deals with such matters as the mutual commitment and the genuine and continuing relationship, was an invalid regulation. The applicant submitted the invalidity contended for had no consequences on the criteria for a spouse visa on defacto grounds but said further that in 1.15A(3), the words “a married relationship, or” should be struck out. The applicant argued that the effect of the invalidity and the striking out of the offending regulations or parts thereof would be that the applicant was a spouse within the meaning of the regulations because she is validly married to the sponsor and accordingly, she would be entitled to a spouse visa and a declaration to that effect.

102. The first respondent argued that if regulation 1.15(1A)(b) fell, the whole of regulation 1.15A(1A) would fall and there would therefore be no visa to which the applicant was entitled. The first respondent argued that it is not permissible for the court to invalidate ninety percent of a regulation in such a way as to alter the fundamental meaning and intent of the regulation. The first respondent argued that the test for severability was not simply that one could take a blue pencil to the offending words and leave a grammatically correct regulation, but that the test was whether the severance would significantly and fundamentally change the operation of the regulations. The first respondent submitted that the court, by severing as extensively as the applicant submitted, would engage in a legislative function that was impermissible. The first respondent referred to the decision of the High Court in *Pidoto & Ors v The State of Victoria* (1943) 68 CLR 87.
103. In reply, the applicant argued that severance of the impugned passages more closely reflected by the intention of the regulations than a complete striking down of reg.1.15A(1A).
104. As I do not consider that there is any inconsistency between regulation 1.15A(1A) and the *Marriage Act 1961*, it is unnecessary for me to consider the extent to which the regulations should be struck down.

Conclusion

105. For the reasons given, none of the applicant's grounds has been made out. Accordingly, the application must be dismissed with costs.

I certify that the preceding one hundred and five (105) paragraphs are a true copy of the reasons for judgment of Riley FM

Associate: Melissa Gangemi

Date: 8 May 2007